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No. 211

In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E & B BREWING COMPANY, INC., AND DRIVERS AND HELPERS LOCAL NO. 38, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK & DISTILLERY WORKERS OF AMERICA, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

E & B BREWING COMPANY, INC., AND DRIVERS AND HELPERS LOCAL NO. 38, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK & DISTILLERY WORKERS OF AMERICA, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered in this case on April 5, 1960.

OPINIONS BELOW

The decision of the Court of Appeals (Appendix, *infra*, pp. 15–27) is reported at 276 F. 2d 594. The findings of fact, conclusions of law, and order of the Board (R. 2a–21a)[1] are reported at 122 NLRB 354.

[1] References designated "B.A." are to the pages of the separately bound appendix to the Board's brief before the court below, containing portions of the record in this proceeding.

JURISDICTION

The judgment of the Court of Appeals (Appendix, *infra*, pp. 27–28) was entered on April 5, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in the circumstances of this case, the National Labor Relations Board properly held that a labor organization and an employer had violated the provisions of the Act forbidding discrimination in employment on the basis of union membership, by carrying out an agreement which required that all applicants for employment must be approved by the union but did not provide adequate assurances that such approval would be exercised on a non-discriminatory basis.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section: * * *

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *.

* * * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In 1955 the E & B Brewing Company, hereafter called the Company, which is engaged in the production and distribution of beer and related products in Detroit, Michigan, executed a two-year collective bar-

gaining contract with Drivers and Helpers Local No. 38 covering, *inter alia*, the Company's truck drivers. The contract was negotiated on an industry-wide basis between Local 38 and the Detroit Brewers Association, and was separately executed by the Company (B.A. 13a; 39a). The provisions of the contract relating to hiring were as follows (B.A. 13a-14a; 61a):

> The employer agrees that in the event he shall require additional employees in the classifications of employment covered by this agreement, he shall notify the employment office operated by the Union. In the event that said employment office is unable to supply help satisfactory to the employer within twenty-four (24) hours following the request, the employer shall be free to hire in the open market. If a vacancy must be filled immediately, the employer shall nevertheless notify the employment office and if satisfactory help cannot be supplied to meet the employer's requirement the employer may hire from the open market but before filling the vacancy permanently he shall consider applicants referred by the Union within said twenty-four (24) hours. The facilities of the employment office operated by the Union shall be made available to both members and nonmembers of the Union and the Union warrants that in the operation of said employment agency and referrals to the employers, it will not discriminate against any individual applicant for employment because of nonmembership in the Union, or otherwise restrain or coerce such applicant because of nonmembership in the Union.

When an employer submits a request for an applicant—whether or not it is for a named individual—the

Union issues the individual a "working card" which is his "admission to go to work" (B.A. 44a-45a 46a). In accordance with the hiring agreement, the Union customarily honored requests by employers that specified non-members be referred for employment, and would furnish such persons working cards (B.A. 18a; 39a–40a, 44a–45a).

Thomas Pfeifle had worked for the Company during college vacation periods from 1952 to 1956 (B.A. 12a–13a; 23a–24a). He had joined the Union in 1953, and had obtained a withdrawal card in 1954 upon his return to college (B.A. 12a; 24a). Following his graduation from college in January 1957, Pfeifle obtained employment with the Company in a capacity not covered by the contract with the Union, but in February was transferred to a truck driver's job within the bargaining unit to replace a driver who was leaving (B.A. 13a; 25a, 28a). The Company did not request or obtain Union clearance for Pfeifle before making the transfer, but told Pfeifle to check his status with the Union before starting the job (B.A. 14a; 26a, 40a). When Pfeifle reported to the Union hall on February 19, he was told that his withdrawal card had expired and that as a result he had "expelled himself automatically" (B.A. 14a; 25a, 53a). Pfeifle inquired about opportunities to be referred to jobs through the hiring hall, and was told that the prospects were unfavorable because of unemployment in the industry (B.A. 14a; 27a). Pfeifle reported his experience at the Union hall to the Company's personnel manager, Frederic Rieg, and was put to work at

the truck driver's job on February 22, 1957 (B.A. 14a; 28a).

On March 8, 1957, Union business agent Harold Bondy had a series of telephone exchanges with personnel manager Rieg, in which Bondy inquired whether Pfeifle was working for the Company, and upon receiving an affirmative answer, demanded that Pfeifle be discharged (B.A. 15a; 34a–35a). Bondy stated two reasons for the demand—that Pfeifle was no longer a Union member, and that he had been hired in violation of the Union clearance provisions of the collective bargaining agreement (*ibid.*). Several days later, on March 12, the Union's President, David Lindsay, also called personnel director Rieg, and repeated the demand that Pfeifle's employment be terminated, again stating the same reasons (B.A. 15a–16a; 34a, 36a, 44a, 54a). Rieg, however, continued Pfeifle in his job.

On March 19, 1957, at the close of a meeting between the Detroit Brewers Association and the Union, which was attended by Rieg, Union business agent Bondy protested that some employers in the Association, making specific reference to the Company, were violating the contract by not using the Union hall for hiring and by not posting job openings (B.A. 16a; 36a–37a). Union president Lindsay, in the conversation that followed, also accused Rieg of violating the referral provisions of the contract (B.A. 16a; 46a). Bondy closed the conversation by stating that he intended to enforce the hiring provision of the contract and would not arbitrate the matter (B.A 16a; 37a).

On March 20, Bondy telephoned Rieg and demanded that Pfeifle be discharged by the end of the day (B.A. 16a; Tr. 98). Rieg consulted with the Company's president, and on the following morning Rieg told Pfeifle that he was being discharged because of the "pressure that the union had brought to bear" (B.A. 17a; 29a, 38a). During a final conversation with Bondy before the discharge, Rieg inquired whether the Union would honor a request from the Company that Pfeifle be referred for a job with the Company (B.A. 16a; 37a, 43a). Bondy replied that under the circumstances no such request could be complied with, but added that the Union hall would refer him to available jobs for other companies (*ibid.*).

B. THE BOARD'S DECISION AND ORDER

The Board concluded that Pfeifle was discharged, upon demand by the Union, because he had not been employed in accordance with the hiring provisions of the contract between the Company and the Union. Although the Union had also initially advanced Pfeifle's non-membership as a reason for terminating Pfeifle's employment, the Board found that on and after March 19, 1957, "the Union dropped its objection based on Pfeifle's nonmembership" (B.A. 2a).

Thus viewing Pfeifle's discharge as grounded solely on enforcement of the hiring provisions of the contract, the Board further concluded that the discharge violated the Act's proscription against discrimination in employment, as contained in Section 8(a) (1)

and (3), and 8(b) (1)(A) and (2), in that the hiring agreement did not satisfy the safeguards against unlawful discrimination specified in the Board's decision in *Mountain Pacific Chapter of the Associated General Contractors, Inc., et al.*, 119 NLRB 883, 893.[2]

In the *Mountain Pacific* case the Board determined that an unqualified hiring agreement which vested exclusive authority in a union to clear applicants for employment was unlawful. The Board reasoned that such an agreement necessarily had a coercive effect upon employees and job applicants in encouraging them "towards compliance with obligations or supposed obligations of union membership, and participation in union activities generally." 119 NLRB at 894, 895. The Board added, however, that inasmuch as the "vice in the [exclusive hiring agreement] lies in the fact of unfettered union control over all hiring," the illegality of such an agreement could be overcome if it contained the following three protective clauses: (1) a guarantee against discrimination in hiring; (2) a reservation in the employer of the right to reject any applicant referred by the union; and (3) a statement of the provisions relating to hiring, including the two clauses mentioned above, all of which must be posted for the inspection of job applicants. See 119 NLRB at 896, 897.

Since in the present case there was no provision for the posting of the procedure relating to hiring,

[2] The hiring agreement itself was not alleged to be unlawful in the complaint, and thus was considered by the Board only to the extent that it was material to the holding that Pfeifle's discharge constituted an unfair labor practice. No remedial order was entered with respect to the agreement (B.A. 4a–7a).

the Board concluded that the contract pursuant to which Pfeifle was discharged did not satisfy the requirements stated in the *Mountain Pacific* decision, and that the discharge was therefore in violation of the Act.

The Board's order (B.A. 4a–7a) requires the Company and the Union to cease and desist from the unfair labor practices found, and to reimburse Pfeifle for lost wages. In addition, the Company is required to offer him reinstatement.

C. THE DECISION OF THE COURT BELOW

The court below, denying enforcement of the Board's order, observed at the outset that the Board's order in the *Mountain Pacific* case had been denied enforcement by the Court of Appeals for the Ninth Circuit, 270 F. 2d 425. The opinion adds that the decisions of the court below in analogous cases had applied the same principle which underlay the Ninth Circuit's decision, and that the conflicting decision of the Court of Appeals for the District of Columbia Circuit in *Local 357* v. *National Labor Relations Board*, 275 F. 2d 646 (C.A. D.C.), "does not appeal to us" (*infra*, p. 19).

The court acknowledged, however, that the Board was empowered to "lay down new so-called 'interpretative' rules" respecting classes of cases which come before it, including those dealing with exclusive hiring arrangements (*infra*, p. 21). But, in the court's view, the application of the Board's *Mountain Pacific* doctrine was particularly inappropriate in this case for two reasons. First, noting that the complaint had

not alleged the invalidity of the hiring agreement itself, the court concluded that the Board had improperly attempted to "establish its * * * rule [governing exclusive hiring agreements] by an adjudication of a matter not in issue before it" (*infra*, p. 23). Second, the court, noting that the contract was "perfectly legal and valid according to the Board's settled rule at the time it was made," concluded that there was "no reason why the public interest demands that the new rule [of the *Mountain Pacific* decision] be imposed at once, and now, as to this particular contract" (*infra*, pp. 25–27). Accordingly, it held that the Board's "attempted retroactive action here was * * * 'arbitrary, capricious, and an abuse of discretion'" (*infra*, p. 27).

REASONS FOR GRANTING THE WRIT

1. The Board's decision in this case rests on an application of the rule adopted in its opinion in the *Mountain Pacific* case, 119 NLRB 883, 893. The rejection by the court below of the Board's *Mountain Pacific* doctrine as "The first infirmity in the Board's conclusion" in this case (*infra*, p. 18), presents the same question which is before this Court in *Local 357, International Brotherhood of Teamsters* v. *National Labor Relations Board*, No. 64, this Term, certiorari granted, June 27, 1960, and is raised by the Board's pending petition for certiorari in *National Labor Relations Board* v. *Hod Carriers, etc.*, No. 75, this Term. The disposition of the present case would appear to be dependent on the Court's action in the *Teamsters* case.

2. The court below, apparently as alternative grounds for its decision, concluded that the Board improperly applied its *Mountain Pacific* ruling in the present case because the invalidity of the hiring agreement had not been placed in issue by the complaint, and because a retroactive application of the *Mountain Pacific* doctrine was not warranted in the circumstances of this case. Neither of these alternative grounds is valid.

(*a*). Contrary to the view of the court below, the Board has made no "adjudication of a matter not in issue before it" (*infra*, p. 23). The violation found in this case, and the remedial order of the Board, are limited to the discriminatory discharge of Pfeifle. The theory of the violation, it is true, presupposes the invalidity of the hiring agreement, just as the theory of the defense before the Board rested upon the asserted validity of the hiring agreement. But the Board is authorized to pass on an issue which, though not directly raised by the pleadings, is indispensable to decision of the question specifically presented.

Moreover, it cannot be maintained that the respondents were not adequately apprised of the issue respecting the legality of the hiring agreement under the *Mountain Pacific* doctrine, or were not afforded opportunity to present their positions on the issue. The Board's opinion in *Mountain Pacific* was handed down shortly after issuance of the Trial Examiner's Intermediate Report in this case, and transfer of the case to the Board. The General Counsel thereupon filed a brief advancing the contention that the hiring

agreement in this case did not constitute a defense to Pfeifle's discharge because it was invalid under the *Mountain Pacific* decision. Respondents then had opportunity, of which the Union availed itself, to present opposing arguments on this issue. Since the Board's *Mountain Pacific* doctrine is a rule of law, the applicability of which to a given hiring agreement is not affected by extrinsic evidence, the opportunity afforded in this case to present written argument on the issue satisfied the requirements of a fair hearing. See *Yakus* v. *United States*, 321 U.S. 414, 435; *Federal Communications Commission* v. *W.J.R.*, 337 U.S. 265, 274–275; *Fay* v. *Douds*, 172 F. 2d 720, 725 (C.A. 2).

(*b*). The view of the court below that the Board has made an unwarranted retroactive application in this case of its *Mountain Pacific* doctrine conflicts with the decision of the Court of Appeals for the First Circuit in *National Labor Relations Board* v. *Local 176 United Brotherhood of Carpenters*, 276 F. 2d 583 (C.A. 1). There, as here, the Board applied its decision in *Mountain Pacific* to an exclusive hiring agreement, which, under then existing Board decisions, was valid at the time of execution. Rejecting the contention that this application was improper because of its retroactive effect, the First Circuit observed that, "If this determination of the Board was retroactive, it was no more so than whenever a court of law decides, on further consideration, to modify earlier views." 276 F. 2d at 586. See also, *Leedom* v. *Local 108, International Brotherhood of Electrical*

Workers (C.A.D.C.), decided March 24, 1960, 45 LRRM 2905.

The determination that the Board may not follow its decision in *Mountain Pacific* in cases involving pre-existing hiring agreements, moreover, transcends this case. The same retroactivity problem is inherent in the two cases already before this Court involving the *Mountain Pacific* doctrine (*supra*, p. 10), as well as in the other similar cases decided by the Board, some of which are now pending in the courts of appeals (see the Board's petition for certiorari in No. 75, p. 13).

Finally, the determination that the Board is precluded from finding hiring agreements predating the *Mountain Pacific* decision to be unlawful by virtue of the principles enunciated in that decison is manifestly erroneous. As the court below recognizes (*infra*, p. 26), the retroactive effect on an existing contract of a change in decisional law does not preclude application of the new rule to the contract where it may fairly be said that the policy considerations underlying the change in decision are not over-balanced by any undue hardship to the contracting parties. See *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203. The continued maintenance of hiring agreements in derogation of the Act's guarantee against discrimination in employment infringes one of the Act's basic policies. The inconvenience to parties to existing contracts resulting from a renegotiation of the hiring provisions to comport with lawful requirements does not outweigh the desirability of preventing further unlawful discriminatory treatment of job applicants.

CONCLUSION

The petition for a writ of certiorari should be granted, or, in the alternative, held in abeyance pending decision of Nos. 64 and 75.

Respectfully submitted.

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JULY 1960.

APPENDIX

In the United States Court of Appeals for the Sixth District

No. 13936

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E & B BREWING COMPANY, INC., AND DRIVERS AND HELPERS LOCAL NO. 38, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK & DISTILLERY WORKERS OF AMERICA, AFL-CIO, RESPONDENTS

Decided April 5, 1960

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before SIMONS and POPE, *Circuit Judges*, and KENT, *District Judge*

POPE, *Circuit Judge:*

The petitioning Board seeks enforcement of its order finding that in the discharge of one Pfeifle, an employee, both the respondent Company and the respondent Union had been guilty of unfair labor practices,[1] and ordering Pfeifle's reinstatement with compensation for loss of certain back pay.

[1] The charge was that the Company violated § 8(a)(3) and the Union § 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act (61 Stat. 136, 65 Stat. 601, 29 U.S.C. §§ 151, et

The examiner refused to credit testimony of Pfeifle that he had been discharged at the instance of the Union because of non-union membership. He found that the sole reason for the discharge was the Union's insistence "upon compliance by the Company with the hiring hall clause of its contract,"[2] that Pfeifle had

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seq.), the relevant portions of said Act here applicable being as follows:

"Rights of Employees—§ 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"Unfair Labor Practices—§ 8(a)—It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 7;

"(2) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in § 7; * * *

"(2) to cause or attempt to cause an employer to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *"

[2] This clause in the collective bargaining agreement between the Company and the Union was as follows: "The employer agrees that in the event he shall require additional employees in the classifications of employment covered by this agreement, he shall notify the employment office operated by the Union. In the event that said employment office is unable to supply

attempted "to secure preferential treatment" and "sought to circumvent the legal and regularly required employment procedures" under which new employees must be engaged through the hiring hall; that the hiring hall "was being run in a nondiscriminatory manner," and he recommended that the complaint be dismissed as to both respondents.

The Board reviewed the rulings made by the examiner at the hearing, and affirmed them. On consideration of the Intermediate Report and the entire record the Board decided that it "hereby adopts the findings of the Trial Examiner but not his conclusions or recommendations." It then concluded that the Company and the Union had violated the sections of the Act previously referred to in maintaining their hiring hall agreement, holding that "an exclusive hiring hall contract was unlawful unless it explicitly provided for three safeguards" of the sort prescribed in the Board's opinion in *Mountain Pacific Chapter of the Associated General Contractors, Inc., et al.*, 119 N.L.R.B. No. 126A, handed down subsequent to the Intermediate Report in this case.

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help satisfactory to the employer within twenty-four (24) hours following the request, the employer shall be free to hire in the open market. If a vacancy must be filled immediately, the employer shall nevertheless notify the employment office and if satisfactory help cannot be supplied to meet the employer's requirement the employer may hire from the open market but before filling the vacancy permanently he shall consider applicants referred by the Union within said twenty-four (24) hours. The facilities of the employment office operated by the Union shall be made available to both members and non-members of the Union and the Union warrants that in the operation of said employment agency and referrals to the employer, it will not discriminate against any individual applicant for employment because of non-membership in the Union, or otherwise restrain or coerce such applicant because of non-membership in the Union."

The first infirmity in the Board's conclusion is that the decision in *Mountain Pacific,* on which it relies, was held erroneous in *N.L.R.B.* v. *Mountain Pacific Chapter of Assoc. Gen. Con.,* 9 Cir., 270 F. 2d 425, where the Board's petition for enforcement of that order was denied. The decision of that case that such a hiring-hall agreement, either with or without the so-called "safeguards" or "protective clauses", is not per se illegal, has been further restated and re-emphasized by that court in *Morrison-Knudsen Co.* v. *National Labor Relations Board,* 9 Cir., —— F. 2d—— (February 19, 1960). This court, in *National Labor Relations Board* v. *F. H. McGraw & Co.,* 6 Cir., 206 F. 2d 635, 640, 641, recognized the same rule, citing with approval two of the cases which the Ninth Circuit decisions followed.[3] Such is the general rule stated by the courts. Other decisions, in accord, are cited in *Morrison-Knudsen,* supra. The only case indicating a contrary rule is that of a divided court in *Local 357, International Brotherhood of Teamsters, Etc.* v. *National Labor Relations Board,* D.C. Cir., ——F. 2d —— (February 18, 1960). The majority opinion, which neither states the facts nor discusses the law, does not appeal to us.

The Board acknowledges that its practice and rulings heretofore, at least prior to its *Mountain Pacific* ruling, have proceeded upon the theory that "we have not found a provision that personnel be secured through the offices of a union violative of the Act absent evidence that the union unlawfully discrimi-

[3] *National Labor Relations Board* v. *Swinerton,* 9 Cir., 202 F. 2d 511; *Del E. Webb Construction Co.* v. *National Labor Relations Board,* 8 Cir., 196 F. 2d 841, 846. In our *McGraw* case the hiring agreement on its face gave preference to union members. Hence the finding of unfair labor practices was upheld.

nated in supplying the Company with personnel." (The quotation is from *The Hrnkin-Conkey Construction Company*, 95 N.L.R.B. 433, 435.)[4] As the Board puts it, its prior practice "was to correct hiring hall abuses as they arose in individual cases, rather than to treat the hiring hall itself." Now, however, the Board tells us it finds its prior rulings to be unsatisfactory. It says that the legality of exclusive hiring halls "had not been comprehensively treated by the Board in its decisions prior to *Mountain Pacific*."

The Board explains at great length why it believes a new approach and a new rule is necessary. It says its old "case-to-case method" where the Board always "predicated its decision upon the existence of discriminatory practices apart from the effect of the contract" was "no longer sufficient", it had proven ineffective so that now it was necessary to "deal with the legality of hiring halls on a comprehensive basis."[5] This comprehensive basis involves the Board's determination here, in the words of its brief, that "the undeniably discriminatory result of the exclusive hiring hall flows as much from the agreement itself as

[4] That rule, as stated by the courts, has been: "It is not illegal for an employer to rely upon a union to provide it with employees" (*National Labor Rel. Bd.* v. *International Assn., Etc.*, 1 Cir., 261 F. 2d 347, 350); "[t]he factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer." (*Del E. Webb Const. Co.* v. *National Labor Relations Bd.*, 8 Cir., 196 F. 2d 841, 845.)

[5] The Board's brief lists at great length cases which it says demonstrate that the Board's case by case effort to treat the "specific abuses only", resulted merely in a continued open flouting of the Act's prohibitions against compulsory unionism; that "in case after case, unions continued to accord preference to members even after Board orders forbidding them to do so", and even "after the Board's orders had been enforced by the Courts of Appeals."

from the illegal operation of the halls of some unions," and that "illegal discrimination against nonmembers is inherent in the hiring provision itself."[6]

As we understand the Board's position, it is that its experience proves that its effort to pick off the sour fruit frequently appearing on the hiring hall tree has been ineffective and altogether frustrating, so now it proposes to chop down the whole tree whenever it is not propped up by the Board's three "protective clauses."[7]

That the rule here contended for is a new one is noted by the Board's statement in its brief: "The case at bar is the first case in which the Board has explicated to this Court its reasons for finding that an exclusive hiring agreement violates the Act even though it may not on its face give preference in employment to members."

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[6] Says the Board: "Simply stated, on the face of the exclusive hiring agreement the employer agrees to discriminate by refusing to hire an applicant or by discharging an employee who does not go to the union hall or follow the union's hiring procedures."

[7] In its original *Mountain Pacific* decision, 119 N.L.R.B. at 897, the Board ruled that an exclusive hiring hall agreement must contain the following protective clauses:—"(1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, by laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements. (2) The employer retains the right to reject any job applicant referred by the union. (3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement."

The agreement involved in this case included clauses (1) and (2). Only (3) was missing.

There is no doubt that the Board has power, in appropriate cases, and in furtherance of its delegated function of making the National Labor Relations Act work, to establish new rules. What may be called new rules may stem from two sources or theories of power. One is the broad grant of power in § 6 of the Act (29 U.S.C. § 156) authorizing the Board "to make * * * in the manner prescribed by the Administrative Procedure Act such rules and regulations as may be necessary to carry out the provisions of this subchapter." The manner prescribed by the Administrative Procedure Act is stated in §§ 3 and 4 of that Act (5 U.S.C. §§ 1002, 1003), and calls for appropriate publications in the Federal Register, and in some cases for notice and an opportunity to be heard. Perhaps the Board might have saved itself a lot of trouble by utilizing this method of making a rule. At any rate, plainly it did not call on this source of power.

A second mode by which new rules sometimes come into being is through the process of administrative adjudication. Just as courts generally do not hesitate to announce new rules to govern novel or changed conditions, so administrative boards often lay down new so-called "interpretative" rules. What the Board is authorized to interpret is the provision of § 8(a)(3) condemning discrimination in regard to hire which, in the language of Radio Officers v. Labor Board, 347 U.S. 17, 48, has "a tendency to encourage" membership in a union.

We disclaim any suggestion that because, in past years, the Board has never held that an exclusive hiring-hall agreement, on the face of it, has such a tendency, it may not now, through a proper adjudicatory process, rule that it does indeed have such a tendency. "One of the purposes which lead to the

creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." Republic Aviation v. Labor Board, 324 U.S. 793, 800. And the Board's first interpretative decision does not have to be the final one.[8]

But while we have no occasion here to doubt that an administrative board, may, as the courts have always done, declare new rules through a process of case to case adjudications, yet we think this Board has not properly done so in this particular case, and that for two separate and distinct reasons.

First, without considering whether such is a requirement of due process, we note that § 5 of the Administrative Procedure Act (5 U.S.C. § 1004) provides that "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * * (a) Persons entitled to notice of an agency hearing shall be timely informed of * * * (3) the matters of fact and law asserted." Here there was not only no complaint charging that the hiring hall agreement was illegal, or that, in the words of the Board's belated position, "illegal discrimination against nonmembers is inherent in the hiring provision itself", but it was ruled, both by the examiner and the Board itself, that the validity of the hiring hall was not in issue.[9]

[8] "Hence we refuse to say that the Commission * * * was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct." *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 203.

[9] The ruling of the examiner appears in a footnote to the Intermediate Report, as follows: "After having rested his case and during the cross-examination of a union witness, the General Counsel suddenly sought to show an illegal administration of the

We hold that the Board cannot establish its attempted rule by an adjudication of a matter not in issue before it. In the absence of the statutory notice

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hiring hall. As the complaint against the Union contained no allegation of such an unfair labor practice and as no evidence to that effect had been adduced during the General Counsel's case-in-chief, the undersigned ruled the proposed attack on the hiring hall as such incompetent. During the colloquy following this ruling, the General Counsel appeared to agree with said ruling when he stated: 'We are not trying to throw out the whole hiring hall. We are saying there was discrimination with respect to the individual himself.'" The matter then referred to appears in the transcript of the hearing as follows:

"Trial Examiner: Are you attacking the hiring hall in this case? Mr. Corenman: Yes, we are. We are contending it is a discriminatory hiring hall. Mr. Paradise: Mr. Trial Examiner, if he is, he has rested his case. He hasn't put in any proof on it, and I don't think he can now. Mr. Corenman: I think we have ample proof to argue this case. Trial Examiner: I didn't see anything in the complaint that led me to believe there was any attack on the hiring hall. If you can show it to me, I'll be—— Mr. Corenman: Yes, I'll be glad to do that, Mr. Examiner. Trial Examiner: This is the first I've recognized there was an attack on the hiring hall.

* * * * *

"Mr. Paradise: Mr. Trial Examiner, I want to press my objection, in part (apart) from the fact that I agree with you, there is no attack on the hiring hall in this complaint. The General Counsel has rested his case. He has put in his evidence on the hiring hall. This witness was not questioned about the referral practices of the union in his direct testimony. There is absolutely no warrant for counsel for the General Counsel roping (reopening) this case on cross-examination on the hiring hall issue. Trial Examiner: What evidence is there in your case in chief as to the attack on the hiring hall? Mr. Corenman: Mr. Examiner, the evidence is Pfeifle himself was not referred to the job because he had been expelled from the union for letting his withdrawal card lapse, and they were not referring him for that reason. Pfeifle has so testified, and so did Rieg. And, furthermore, Pfeifle was also being discriminated against in the discriminatory operation referral system in that they were making an exception of Pfeifle

of "the matters of fact and law asserted" the Board lacked power to pass upon any such issue as that now tardily argued in its briefs.[10]

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and would not refer him, would not in any case refer him to the E & B Brewery, because that was his last employer when his withdrawal expired and he was expelled, and we have testimony on that score from both Pfeifle and Rieg. Trial Examiner: I don't understand that as an attack on the hiring hall. Mr. Corenman: That shows the hiring hall was discriminatorily administered with respect to Pfeifle. If it was discriminatorily administered with respect to Pfeifle, then, of course, there is a violation of section 8(b)(2) and section 8(a)(3). Trial Examiner: That doesn't bring the whole hiring hall into the question. I'll sustain your objection. Mr. Corenman: We are not trying to throw out the whole hiring hall. We are saying there was discrimination with respect to the individual himself. Trial Examiner: I'll take any evidence you have on discrimination as far as Pfeifle is concerned, but as far as going into the hiring hall, I see no reason to go into it. Mr. Corenman: Mr. Examiner, when counsel attempts to bring in evidence that he has a non-discriminatory hiring hall, I think I am entitled to attack it whenever he brings it into issue with his own testimony. Mr. Paradise: I haven't brought that in with this witness at all. Trial Examiner: I don't believe it's been brought in. I'll sustain the objection. You may proceed."

Said the Board: "The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The ruling are hereby affirmed."

The Board's brief here concedes that "the validity of the contract was not an issue at the hearing." See *Morgan* v. *United States*, 304 U.S. 1, 18: "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

[10] The Board attempts to avoid this result by two arguments, both specious. First, it says that after the Intermediate Report here the Board's decision in *Mountain Pacific* came down, and then the General Counsel filed a brief with the Board in this case urging that the contract here was invalid under *Mountain Pacific*. The Board says that although the Union then urged that the

There is a second reason why we think the Board cannot apply its newly conceived rule in this case. This becomes apparent when it is noted what the Board is trying to do here. In an effort to minimize the effect of the Board's order its brief contains some statements which are not quite consistent with its main argument. Thus it says: "The only substantial affirmative action [the order] imposes upon either party is that it requires the reinstatement of Pfeifle with back pay." It says "the Board is not requiring the Company or the Union to insert any clauses in their contract." And in response to the Union's argument that the *Mountain Pacific* Rule may not be applied retroactively to the instant case, the brief says that "the only portion of the Board's order which has any retroactive effect is that which requires respondents to make Pfeifle whole for any loss he may have suffered by reason of the discrimination against him."

Nothing could be more unrealistic. For Pfeifle, although only one man, furnishes the test case through which the Board now seeks to procure an adjudication that the respondents were guilty of an unfair labor practice solely and only because their hiring-hall contract, perfectly legal and valid according to the Board's settled rule at the time it was made, has now, retroactively, been adjudged per se illegal for want of one of the Board's three protective clauses demanded

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Board could not properly consider that argument because the validity of the hiring hall provision had not been litigated, "it did not question the validity of the [*Mountain Pacific*] decision itself." Secondly, it says, respondents did not assert they had any evidence to adduce with respect to the *Mountain Pacific* issue.

Since the Board was without power to consider any such issue, it is hard to perceive why the Union was called upon to debate the *Mountain Pacific* case, or to offer evidence on a non-existent issue.

under its new ruling. The Board's doctrine would retroactively invalidate every union contract which contains an exclusive hiring hall provision. If the Board's order stands, it is doubtful if even the Board can say how many hundreds or thousands of employers and unions are, as of now, guilty of similar unfair labor practices.

It is not suggested that under no circumstance may an administrative ruling apply retroactively. Indeed, as suggested in *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. at 203, any "case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency." But in particular cases, for a board to make its new ruling retroactive may well be an abuse of discretion. And this court, under the Administrative Procedure Act, § 10(e) (Title 5 § 1009(e)) is required to "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion * * *." We think the sound principle applicable is that stated in *National Labor Rel. Bd.* v. *National Container Corp.*, 2 Cir., 211 F. 2d 525, 534, as follows: "It is well settled that where, as here, an administrative agency in pursuance of its adjudicatory function makes an *ad hoc* change in one of its administrative policies, such change may be applied retroactively in an appropriate case. *Securities and Exchange Comm.* v. *Chenery Corp.*, 332 U.S. 194. * * * The test is whether 'the practical operation of the Board's change of policy * * * [will] work hardship upon respondent altogether out of proportion to the public ends to be accomplished.' *N.L.R.B.* v. *Guy F. Atkinson Co., supra*, [195 F. 2d 149] * * *" This is in accord with the limitations upon retroactivity which were recognized in the *Chenery Corp.* case, supra, where it was noted that "ill effect of the retro-

active application of a new standard" must be balanced against the necessities of the public. In weighing these matters here we are impressed with the fact that there appears no reason why the public interest demands that the new rule be imposed at once, and now, as to this particular contract.

We are of the opinion that here, as in the case of *N.L.R.B.* v. *Guy F. Atkinson Co.*, 9 Cir., 195 F. 2d 141, 149, 151, from which the Second Circuit quoted, the Board's change of rules would work hardship upon respondents "altogether out of proportion to the public ends to be accomplished." As we have noted above, the Board has ample ways of instituting new rules without working any such hardship on these particular respondents.

We hold that its attempted retroactive action here was, in the words of the *Atkinson* case, supra, "agency action which we are directed by § 10 of the Administrative Procedure Act to set aside as arbitrary, capricious, and an abuse of discretion."

Enforcement of the Order is denied, and the Order is set aside.

DECREE

(Filed April 5, 1960)

On Petition for Enforcement of an Order of the National Labor Relations Board.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, It is now here *ordered*, and *adjudged* and *decreed* by this Court that the petition for enforcement be and it is denied, and the order

of the National Labor Relations Board is hereby set aside.

Approved for entry:

[s] WALTER L. POPE,
United States Circuit Judge
(sitting by designation).

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. ———

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

E & B BREWING COMPANY, INC., AND DRIVERS AND HELPERS LOCAL NO. 38, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK & DISTILLERY WORKERS OF AMERICA, AFL-CIO,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Drivers and Helpers Local Union No. 38 respectfully requests that this Honorable Court refuse to issue a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered in this case on April 5, 1960.

COUNTERSTATEMENT OF QUESTION PRESENTED

The Question Presented in the Petition states erroneously, that the agreement required that all applicants must be "approved" by the Union. It also states, erroneously, that the agreement did not provide "adequate assurances

that such approval would be exercised on a non-discriminatory basis." In the interest of accuracy, Respondent Union submits the following as its counterstatement of the question presented:

Whether, in the circumstances of this case, the National Labor Relations Board properly held that the Union and the Employer had violated the provisions of the Act forbidding discrimination in employment on the basis of union membership by effecting the discharge of an employee pursuant to the terms of an agreement which required (a) that all applicants for employment must be referred by the Union, (b) that applicants referred by the Union must be satisfactory to the Employer, and (c) that there must be no discrimination in the referral of employees based upon their union membership or nonmembership.

ADDITIONAL STATUTE INVOLVED

In addition to the pertinent provisions of the National Labor Relations Act, as amended, cited in the Petition for a Writ of Certiorari, Sections 5 and 10 of the Administrative Procedure Act, 5 U.S.C. Sec. 1001, are also involved. They provide, in pertinent part, as follows:

> "Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . (a) Persons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted."
>
> * * *
>
> "Sec. 10 (e). Scope of review. So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency

> action. It shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; . . ."

ADDITIONAL STATEMENT OF THE CASE

A. The Board's Findings of Fact

The only findings of fact in this case were made by the Trial Examiner in his Intermediate Report (B.A. 12a-20a).[1] These were adopted in their entirety by the Board which made no independent findings of fact (B.A. 2a).

Therefore, in substitution for the statement of facts set out in the Petition, the Union refers the Court to the findings of fact made by the Trial Examiner (B.A. 12a-20a) which were summarized as follows in the Decision and Order of the Board (B.A. 2a):

> "In his Intermediate Report the Trial Examiner found, and we agree, that the Company and the Union had an industry-wide exclusive hiring-hall contract, which the Union agreed to operate without discrimination against non-members; that the Company did not follow the contractual procedure for employing Pfeiffle as a truck driver (to wit: by applying to the Union's employment office or hiring hall); that the Union on or about March 8, 1957, and again on March 12 advised the Company that it had violated the contract by failing to fill the position through the Union's

[1] References designated "B.A." are to pages of the appendix to the Board's brief in the Court below; those designated "U.A." are to pages of the appendix to the Union's brief in the Court below; those designated "Bd. Br." are to pages in the Board's brief in the Court below; those designated "Pet." are to pages in the Petition for a Writ; and those designated "Pet. App." are to the Appendix to said Petition.

hiring hall and by filling it with a nonmember, that on March 19 and thereafter the Union dropped its objection based on Pfeifle's nonmembership, and demanded his discharge solely in order to force the Company to comply with the hiring-hall clause of the contract; that for the same reason the Union refused the Company's request to clear Pfeifle, but at the same time agreed to refer Pfeifle to any other employer covered by the industry-wide contract; and that the Company accordingly discharged Pfeifle on or about March 21 with the explanation that the discharge was due to the pressure from the Union."

In addition, the Trial Examiner made the following findings which were also adopted by the Board: that the Union customarily honored requests by employers, including Respondent Company, that specified non-union individuals be referred (B.A. 18a); that no such request was made by Respondent Company in the instant case until almost a month after Pfeifle had been hired in derogation of the hiring-hall clause of the contract (ibid); that for the Union to have honored the request at that late date would have condoned the Company's prior breach of the hiring-hall clause and nullified the clause entirely (ibid); that the "whole trouble here" stemmed from Pfeifle's attempt to secure preferential treatment for himself (B.A. 19a); that the hiring hall was being run in a non-discriminatory manner (ibid); that there was no discrimination against Pfeifle based upon his nonmembership in anything which the Union did in this case (ibid); and that the Union was merely insisting upon compliance with the hiring-hall clause of its contract (B.A. 20a).

The hiring-hall clause expressly barred discrimination by the Union and it gave the Employer the right to reject applicants referred by the Union if they were not "satisfactory to the employer" (B.A. 13a-14a).

B. The Board's Decision and Order

To the discussion of the Board's Decision and Order which is contained in the Petition, Respondent Union would add only the following:

As stated above, the Board affirmed the findings of the Trial Examiner including his finding that the Union, in the final analysis, demanded the discharge of Pfeifle solely to force the Company to comply with the hiring-hall clause of the contract and not for any reason having to do with Pfeifle's membership or non-membership in the Union (B.A. 2a, 17a, Bd. Br. 10). The Board also affirmed all of the rulings of the Trial Examiner (B.A. 2a) including his ruling that the legality of the hiring-hall provision in the contract was not in issue (U.A. 1b-3b, Decision of Court below, fn. 9). Moreover, the Board declared in its decision, "Here the General Counsel has not alleged that there was a substantively unlawful contract or hiring practice" (B.A. 4a) as, indeed, it had to, in view of the statement made by the General Counsel at the hearing. "We are not trying to throw out the whole hiring hall. We are saying that there was discrimination with respect to the individual himself." (U.A. 3b)

Despite the affirmative finding of no discrimination against Pfeifle based on union membership or non-membership, and the admitted absence of any issue in the case involving the legality of the hiring-hall provision, the Board concluded that the hiring-hall provision was unlawful on its face and thereby rendered the discharge of Pfeifle an unfair labor practice. The vice of the hiring-hall provision, according to the Board, was its lack of the third of the "protective provisions" promulgated in *Mountain Pacific Chapter of Associated General Contractors*, 119 NLRB 883 (enf. den. 270 F. 2d 425, C.A. 9), namely, the requirement that the agreement must contain a clause

requiring the parties to "post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement."

The Petition states (p. 8, fn. 2) that since "the hiring agreement itself was not alleged to be unlawful in the complaint", it was "considered by the Board only to the extent that it was material to the holding that Pfeifle's discharge constituted an unfair labor practice. *No remedial order was entered with respect to the agreement*" (italics supplied). However it is to be noted that the Board's Order required the Union to cease and desist from causing the Company to discriminate in violation of Section 8(a)(3) of the Act, and from in any manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act (B.A. 6a). It is also to be noted that the Board contends that an exclusive hiring hall without the three prescribed protective clauses "on its face satisfies the statutory requirements for establishing a violation of Section 8(a)(3) and 8(b)(2) of the Act" (Bd. Br. p. 37 ff, Pet. p. 8), and that such an agreement also, *per se*, "constitutes unlawful coercion in violation of Section 8(b)(1)(A) and 8(a)(1) of the Act" (Bd. Br. p. 55 ff, Pet. p. 8). Therefore, it is evident that the Board's Order, although not explicitly directed against the agreement, was in fact directed against it, since compliance with the Order would be impossible unless the agreement were nullified.

REASONS FOR DENYING THE WRIT

1. The Board argues that the disposition of the present case is dependent on the Court's action in *Local 357, International Brotherhood of Teamsters* v. *National Labor Re-*

lations Board, No. 64, this Term, certiorari granted June 27, 1960. This is not necessarily so. To be sure, a reversal of the judgment of the District of Columbia Court of Appeals in the *Local 357* case because of this Court's rejection of the *Mountain Pacific* doctrine would be dispositive of the instant case. On the other hand, affirmance of the judgment of the District of Columbia Court of Appeals in the *Local 357* case should not cause a reversal in the instant case because (a) there are material factual differences between the two cases, and (b) in the instant case the Court below refused to enforce the Board's Order on two additional grounds which are completely valid even if this Court should hold that the Board has the power to outlaw all hiring-hall agreements which do not contain the *Mountain Pacific* protective provisions. Since these two additional grounds do not present questions justifying review by this Court, certiorari should be denied.

2. The material factual differences between the instant case and *Local 357, International Brotherhood of Teamsters* v. *NLRB*, *supra*, are the following: In the *Local 357* case none of the three so-called protective clauses prescribed in the *Mountain Pacific* case was contained in the contract. In the instant case the contract contained categorical prohibitions against discrimination or coercion by the Union and a specific reservation by the employer of the right to reject applicants who were not qualified in the opinion of the employer. It lacked only the third of the protective clauses which calls for the posting of the provisions governing the hiring hall.

In our brief to the Court below (p. 21) we reiterated the assertion contained in our reply brief submitted to the Board that "as far as the third of the new criteria is concerned, this, of course, is not contained in the contract and very likely was not contained in any contract in the United States prior to the publication of the Board's deci-

sion in *Associated General Contractors* (i.e. *Mountain Pacific*)." This assertion has never been challenged by the Board. Yet, merely because the contract lacked a provision the need for which would not have been foreseen by even the most learned and astute labor negotiators, the contracting parties have been held guilty of unfair labor practices.

The second material difference between the instant case and the *Local 357* case is that here there were affirmative findings by the Trial Examiner, adopted by the Board, negating any discrimination against the employee in question and negating any inference that the hiring hall was operated in discriminatory fashion. On the latter point the Board affirmed the Trial Examiner's finding that "the hiring hall, at least for the purposes of this case, was being run in a non-discriminatory manner" (B.A. 19a). Thus, the Board's Decision presents the anomaly of affirmative findings that there was no discrimination against the employee in question or in the administration of the hiring hall thus totally rejecting the unfair labor practice allegations of the Complaint; and the conclusion that the employee was discriminated against because the hiring hall was, as a matter of law, discriminatory because it lacked the third protective provision belatedly conceived by the Board. There appears to be no way of reconciling the Board's findings with its conclusions.

3. In any event, the question in this case is a much narrower one than that presented by the *Local 357* case and may be briefly stated as follows: Does the absence of the third of the Mountain Pacific protective clauses render a discharge discriminatory even when the Board has found affirmatively that there was no discrimination against the individual and no discrimination practiced in the operation of the hiring hall?

The first two protective clauses are apparently intended to guarantee that a hiring hall will not be operated as a virtually closed shop which, in the Board's view, is what renders it unlawful. Thus, the Board stated in its *Mountain Pacific* decision (p. 896):

> "We agree with Senator Taft, the principal proponent of the 1947 Taft-Hartley amendments, who stated that Section 8(b)(2) 'was not intended to put an end to all hiring halls, but only those which amount to virtually closed shops.'"

However, the third protective clause, which requires the posting of provisions relating to the operation of the hiring hall, is intended to be informational only and does not go to the substantive requirement of non-discriminatory referral of applicants. Therefore, even assuming, arguendo, that the promulgation of the *Mountain Pacific* doctrine was otherwise within the Board's authority, there appears to be no justification for holding a hiring hall illegal merely because it lacks the third protective clause, a purely informational requirement, in the face of affirmative findings which negate any discrimination in the operation of the hiring hall.

4. For the reasons stated in its brief in the Court below, Respondent Union submits that the *Mountain Pacific* doctrine is invalid in its entirety, being a gross example of administrative agency legislation in the guise of statutory interpretation. Since this question has been accepted for review by this Court in the *Local 357* case it would be redundant to argue it further here. However, since the avowed purpose of the *Mountain Pacific* doctrine is to relieve the Board of the burden of case-by-case adjudication of the discriminatory character of exclusive hiring halls, this Court's opinion in *National Labor Relations Board* v. *Insurance Agents International Union*, decided February 23, 1960, 4 L. Ed. 2d 454, is clearly in point (p. 470):

> "We think the Board's resolution of the issues here amounted not to a resolution of interests which the Act had left to it for case-by-case adjudication, but a movement into a new area of regulation which Congress had not committed to it. Where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked."

5. The retroactive application of the *Mountain Pacific* doctrine to this case constituted arbitrary and capricious agency action and an abuse of discretion within the meaning of Section 10(e) of the Administrative Procedure Act (5 U.S.C. Sec. 1009(e)).

(a) The Court below approached this question on the basis that the test is whether "the practical operation of the Board's change of policy . . . (will) work hardship upon respondent altogether out of proportion to the public ends to be accomplished." *Securities and Exchange Commission* v. *Chenery Corp.*, 322 U.S. 194. In weighing the "public ends to be accomplished" against the hardship upon the respondents, the following facts are relevant: (1) The contract in question had been executed about three years before the *Mountain Pacific* decision and conformed to the law as then interpreted by the Board and the Courts.[2] (2) The contract had expired on April 1, 1958, several months before the Board's decision was issued in the instant case, and on the same day that the *Mountain Pacific* doctrine was published by the Board. (3) The findings of the Trial Examiner adopted by the Board established that the "whole trouble here" stemmed from Pfeifle's at-

[2] *The Hunkin-Conkey Construction Co.*, 95 NLRB 433; *National Union of Marine Cooks and Stewards*, 90 NLRB 1009; *Pacific Shipowners Association*, 98 NLRB 582, 584; *National Labor Relations Board* v. *Siemerton*, 202 F. 2d 511 (C.A. 9) cert. den. 346 U.S. 814; *National Labor Relations Board* v. *McGraw and Co.*, 206 F. 2d 635 (C.A. 6); *Eichlay Corporation* v. *NLRB*, 206 F. 2d 799 (C.A. 3). See also Seventeenth Annual Report of the National Labor Relations Board, 1952, p. 149.

tempt to secure preferential treatment for himself (B.A. 19a) rather than from discrimination against him. (4) As previously stated, the findings establish that Pfeifle was not discriminated against because of membership or non-membership in the Union and that the hiring hall had been operated in non-discriminatory fashion.

On these facts and without bothering to ascertain whether the parties had conformed their hiring-hall provisions with the *Mountain Pacific* requirements in their new contract which had gone into effect on April 1, 1958, the Board held the parties guilty of unfair labor practices because of the *ex post facto* illegality of their expired contract, ordered them to cease and desist, to reinstate Pfeifle with back pay, and to post prescribed notices to all union members and all employees (B.A. 6a-8a). Of no import to the Board was the fact that Pfeifle's reinstatement would presumably require the displacement of another employee. In these circumstances the Court below was clearly correct in concluding:

> "In weighing these matters here we are impressed with the fact that there appears no reason why the public interest demands that the new rule be imposed at once, and now, as to this particular contract."

(b) The case of *Leedom* v. *Local 108, International Brotherhood of Electrical Workers* (C.A.D.C.) decided March 24, 1960, 45 LRRM 3005, relied on by the Board, does not support its position. That case did not involve unfair labor practice charges but was a representation case involving the right of the Board to impose its revised contract bar rule to previously executed contracts. While holding that the Board might thus apply its contract bar rule, the Court indicated that a contrary result might obtain if the retroactive application of a new rule "made conduct actionable which theretofore had not been actionable."

Distinguishing between the unfair labor practice cases relied upon by the Union and the problem raised by the contract bar rule in representation cases, the Court stated:

> "Finally, and perhaps most important, the Board in the cases upon which the Union relies had readily available alternatives which were not present here. By announcing its new rules prospectively in order to allow the parties involved time to bring their practices and agreements into conformity with the new requirements, it could have avoided proscription of past conduct which was presumably legal when undertaken. Here in the nature of the problem the Board could not promulgate these rules prospectively without having to wait up to five years to put its new policies into full effect. This drag on the administrative process would tend to destroy its flexibility."

In the instant case the Board could, of course, have announced its new rule prospectively in order to allow employers and unions time to bring their practices and agreements into conformity with new requirements and could thus have avoided the proscription of past conduct which was presumably legal when undertaken.

(c) In a closely analagous case: *National Labor Relations Board* v. *International Brotherhood of Teamsters*, 225 F. 2d 343 (C.A. 8), the Court refused to enforce an order of the Board finding the respondents guilty of unfair labor practices because of their execution of a contract which conformed to the then prevailing Board doctrine with respect to the delegation to a union of authority to determine seniority problems but which the Board had held unlawful following a change in the Board's position on the legality of such a provision. The Court stated:

> It does not seem to us to make either legal or common sense to say that the Board's rulings are wholly without any sanctity under the Act as a guide

> for employer and union conduct and that the Act intends that anyone who relies upon and uses the Board's rulings as a basis for his actions shall be left subject to entrapment and branding as a perpetrator of an unfair labor practice in what he has thus done, if the Board thereafter chances, by reason of change in personnel or otherwise, to depart from one of its previous positions and rulings."

See also *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141 (C.A. 9), and *Pedersen* v. *National Labor Relations Board*, 234 F. 2d 117 (C.A. 2).

(d) The Board itself has recognized this principle. In *Screw Machine Products*, 94 NLRB 1609, an unfair labor practice was committed at a time when the Board was not asserting jurisdiction over the employer. After the Board had revised its jurisdictional standards, a complaint was issued against the employer based upon said unfair labor practices. In dismissing the complaint the Board stated:

> "This result is dictated not only by the Board's obligation to respect its own prior decisions but also by desire for fair play."

Similarly in *Almeida Bus Service*, 99 NLRB 498, 501, the Board affirmed its "reluctance to impose statutory sanctions against a party for conduct committed after advice and notice from the Board that its conduct would not be actionable . . . (and) that it would not be equitable to make findings of violation of the Act." See also *Tom Thumb Stores Inc.*, 95 NLRB 57

(e) Notwithstanding its own recognition of the principle that statutory sanctions should not be imposed against a party for conduct committed after advice and notice from the Board that its conduct would not be actionable, and notwithstanding that the hiring provisions in the instant

contract and in innumerable other contracts throughout American industry were negotiated in good faith in conformity with the then prevailing doctrine of the Board that such contracts were lawful, the Board now attempts to defend its attempt to brand the parties to all such contracts — indeed, to virtually all hiring-hall agreements in existence at the time of the *Mountain Pacific* decision — as being violators of the law.

It is respectfully submitted that the ruling of the Court below that the Board's order constituted an abuse of discretion within the meaning of the Administrative Procedure Act, was clearly correct.

6. The legality of the contract was not in issue in the proceedings before the Board.

(a) It is clear beyond peradventure that the validity of the contract was not in issue. There is no allegation as to the illegality of the contract in the complaint and the Board's General Counsel stated at the hearing:

> "We are not trying to throw out the whole hiring hall. We are saying there was discrimination with respect to the individual himself." (C.A. 35, Pet. App. 24, fn. 9)

The Trial Examiner ruled that the validity of the hiring hall was not in question and his ruling was affirmed by the Board (ibid.). It was conceded by the Board in its brief to the Court below (p. 65) that the validity of the contract was not in issue at the hearing. Nevertheless, the entire basis for the Board's Order is its finding that the contract was illegal on its face and the effect of its Order is to require the nullification of the contract.

(b) In defense the Board now argues that "The violation found in this case and the remedial order of the Board are limited to the discriminatory discharge of Pfeifle." This contention borders on the frivolous since,

as pointed out above, the Board's Order directs the Respondents to cease and desist from violating Sections 7, 8 (a) (1), 8 (a) (3) and 8 (b) (2), and the Board's basic contention here, as in the Court below, is that the existence of a hiring-hall provision lacking the prescribed protective clauses is *per se* a violation of those sections. Therefore, although on its face the Board's Order is not directed against the contract, the continued application of the contract would constitute a violation of the Board's Order to the same degree as would be the case if the Board's Order specifically invalidated the contract. Further, if, as contended by the Board, the issue of the validity of the contract was, in fact, litigated, why did the Board not expressly invalidate the contract in its Order instead of taking an indirect route to reach the same objective?

(c) The Board argues further that it is authorized to pass upon an issue which, although not directly raised by the pleadings, is indispensable to a decision of the question specifically presented (Pet. p. 11). This generalization can have no application to the instant case where the issue presented was whether there had been discrimination against the employee himself, where the Board's General Counsel specifically disavowed any attack on the legality of the hiring hall, and where the "law of the case" as established by the Trial Examiner's ruling and the Board's affirmance of that ruling is that the validity of the hiring hall was not in contention. When the theory upon which the case was prosecuted was washed out by the finding that there had been no discrimination against Pfeiffer, the Board introduced a completely new theory based upon the *ex post facto* application of the *Mountain Pacific* doctrine. Far from having been "directly raised by the pleadings" this issue had been excluded from consideration by the Trial Examiner's ruling at the hearing which was affirmed by the Board. Far from having been "indis-

pensable to decision of the question specifically presented", it was, under "the law of the case" irrelevant to the decision of the question specifically presented.

(d) The Board also argues that the Respondents were afforded an opportunity to present their positions on the applicability of the *Mountain Pacific* doctrine. The basis for this contention is that after the *Mountain Pacific* decision was published following the issuance of the Intermediate Report in the instant case, the Board's General Counsel filed a supplemental brief with the Board urging that the *Mountain Pacific* decision be applied here. Respondent Union urged that the Board could not properly consider that contention because the validity of the hiring-hall provision was not in issue and had not been litigated (Pet. App. p. 24-25, fn. 10). As Respondent Union stated in its brief to the Court below:

> "The Board's Brief states that the Union did not question the validity of the *Mountain Pacific* decision. However, reference to the Addendum to the Union's Reply Brief, which was filed with the Board and which is before this Court, will show that the Union stated that the General Counsel had raised 'a completely new issue in the case' based upon the *Mountain Pacific* decision, that 'there is no basis upon which this contension can now be considered', that to apply retroactively the *Mountain Pacific* decision 'could not be justified on any theory consistent with the fair and proper administration of the law'. In the Reply Brief which the Union had submitted earlier, the Union charged the General Counsel with having reversed his position as stated at the hearing by now contending that the hiring hall was unlawful and that it was discriminatorily administered (Union's Reply Brief 3). The Union urged that the contention that the hiring hall was unlawful should not be entertained by the Board and requested that the case be remanded for further hearing if the contention of illegality being

made by the General Counsel were to be considered (p. 4-5)."

The Court below correctly concluded:

"Since the Board was without power to consider any such issue it is hard to perceive why the Union was called upon to debate the *Mountain Pacific* case or to offer evidence on a non-existent issue."

The Court further held that "The Board cannot establish its attempted rule by an adjudication of a matter not in issue before it. In the absence of the statutory notice of 'the matters of fact and law asserted', the Board lacked power to pass upon any such issue as that now tardily argued in its briefs."

(e) The cases cited in Petitioner's brief at page 12, *Yakus* v. *United States*, 321 U.S. 414, 435, *Federal Communications Commission* v. *W.J.R.*, 337 U.S. 265, *Fay* v. *Douds*, 172 F. 2d 720, have no application to the instant case since, among other reasons, none of them dealt with a situation in which the issue upon which the decision was predicated had not only not been raised by the pleadings, but had been specifically removed from contention at the hearing. Further, Section 10(b) of the National Labor Relations Act specifically requires that the respondents must be served with a complaint "stating the charges in that respect and containing a notice of hearing." It provides further that the Board may amend the complaint "at any time prior to the issuance of an order based thereon." In the instant case the statute placed no burden upon the Respondent Union to argue with respect to a non-existent issue, but it required the Board to amend its complaint prior to the issuance of its decision and provide Respondent an opportunity to make answer and litigate the new issue.

(4) The Board has consistently held that it will not predicate findings and orders upon matters which were not litigated at the hearing. *Starrett Brothers & Eken, Inc.*, 92 NLRB 1757-1759; *International Longshoremen's and Warehousemen's Union et al.*, 94 NLRB 1091, 1092, 1095, fn. 9; *Newspaper and Mail Deliverers Union of New York and Vicinity*, 101 NLRB 589; *Pacific Intermountain Express Co.*, 107 NLRB 837, 842, *Hunter Engineering Co.*, 104 NLRB 1016, 1017, fn. 4. In *International Brotherhood of Teamsters*, 108 NLRB 1008, 1011, a closely analagous case, the Board refused to consider the General Counsel's "exception to the Trial Examiner's failure to find that one of the contract provisions was unlawful because it reposed in Local 710 the authority to settle controversies dealing with seniority." The Board there held:

> "As this allegation was not made in a complaint and was not litigated at the hearing, we do not pass on this exception."

Finally, the Board argues in its Petition:

> "Since the Board's *Mountain Pacific* doctrine is a rule of law the applicability of which to a given hiring hall agreement is not affected by extrinsic evidence, the opportunity afforded in this case to present written argument on the issue satisfied the requirements of a fair hearing."

This begs the question since it presupposes that there was in fact an issue in the case as to the legality of the hiring agreement. There was in fact no such issue unless it be contended that a new issue can be created by a contention made in the General Counsel's brief to the Board rather than by amendment of the complaint. Absent an amendment to the complaint it is submitted that the parties were entitled to rely upon the issues as framed by the

pleadings and as denied and litigated at the hearing as constituting the issues which would be the basis for the Board's adjudication.

CONCLUSION

Respondent Union therefore submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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